[K-67]

Supreme Court, U. S.
FILED
JUN 6 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-1776

In the Matter of the Application of RAYMOND B. HARDING,
Appellant,

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

against

JAMES P. MELTON, Commissioner of New York State Department of Motor Vehicles, CHARLES J. WILCOX, District Attorney of Rensselaer County, THE TOWN COURT OF NASSAU, THE TOWN COURT OF SCHODACK,
Appellees.

On Appeal from the Court of Appeals of New York

MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL ON BEHALF OF APPELLEE, JAMES P. MELTON, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES

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The Daily Record
Rochester, New York

(6091)

Spaulding Law Printing
Syracuse, New York

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James P. Melton, Commissioner of New York State Department of Motor Vehicles, one of the appellees, moves the Court to dismiss the appeal on the ground that it is manifest that no substantial Federal question is presented in this case. This is an appeal from an order of the Court of Appeals of the State of New York which unanimously affirmed an order of the Appellate Division of the Supreme Court of the State of New York

unanimously reversing a judgment of Supreme Court, Albany County, which declared New York State Vehicle and Traffic Law, §510(4-a) and the form of notice used by the Commissioner in suspending the appellant's operator's license to be unconstitutional under the due process clause of the Fourteenth Amendment. Reported at 49 NY2d 739, affg 67 AD2d 242, 415 NYS2d 286.

Question Presented

Do the suspension of the appellant's automobile operator's license pursuant to New York State Vehicle and Traffic Law, §510(4-a), and the form of notice used by the Commissioner to implement the statute, offend the constitutionally-guaranteed rights afforded by the due process clause of the Fourteenth Amendment?

Statutory Operation

Subdivision 4-a of section 510 of the Vehicle and Traffic Law provides that the Commissioner of Motor Vehicles may suspend the license of a person who has failed to appear within three months of the return date, pursuant to a traffic appearance ticket on a moving violation, pending receipt of notice that the person has appeared, and that the suspension shall take effect no less than thirty days from the day upon which the notice thereof is sent to such person.

The Commissioner utilized a form, designated MV-1160, to notify a person, in default of appearance, of the suspension that would become effective thirty (30) days from the date of the notice unless there was notification from the Court that the summons had been answered or his record indicated that other action was necessary.

Factual Statement

The appellant, Raymond B. Harding (petitioner), was arrested by a New York State Trooper on May 24, 1977, for speeding and was directed to appear at the Justice Court, Town of Saugerties, New York, to answer to the charge. He did not appear before the Town Justice within three months of the return date, which fact was made known to the respondent by the Court pursuant to section 514(3) of the Vehicle and Traffic Law. A notice of suspension pursuant to section 510(4-a) of that law was forwarded to the petitioner to be effective thirty days from the date thereof advising him of his default, its consequences and his opportunity for relief from the pending suspension of his license by presenting himself before the Court.

The petitioner was also arrested for speeding on June 20, 1977, by a New York State Trooper and was directed to appear before the Town Justice of Catskill, New York, to answer to the charge. He did not appear before that Town Justice within three months of the return date. A notice of suspension to be effective thirty days from the date of that notice was forwarded to the petitioner advising him of his default, its consequences and his opportunity for relief from the pending suspension of his license.

The petitioner was again arrested on March 11, 1978 by New York State Trooper D.E. Morse for speeding in the Town of Schodack, New York and on March 30, 1978 the petitioner was arrested by Trooper E.G. Hines for driving in the Town of Nassau while his license was under suspension.

On the same day, March 30, 1978, petitioner first appeared before Judge Crommie in Catskill and he first appeared before the Saugerties Justice on April 5, 1978. These appearances were made known to the respondent Commissioner, who then lifted the suspension of the petitioner's license. (R-2).

On April 12, 1978, Trooper Morse filed a second charge against the petitioner, namely, driving while his license was suspended

on March 11, 1978, the day that he was arrested for speeding in the Town of Schodack.

On May 12, 1978, a trial was held in the Town of Schodack Justice Court on the charge of appellant's operating a motor vehicle on March 11, 1978, while his license was under suspension in violation of section 511(1) of the Vehicle and Traffic Law. At the trial the defendant challenged the validity of the suspension notice. Before a decision was made in that trial, Harding brought this proceeding to review the suspension of his license, alleging that prior to such suspensions the due process requirements of notice and hearing were not afforded him, and that the form of notice used by the Commissioner is unconstitutional in that it is vague and was not promulgated pursuant to the requirements of New York law, and for an order enjoining the District Attorney and the named Justices from proceeding against the petitioner for the charged traffic violations. Trials in the Justice Courts were stayed pending this proceeding.

Respondents, Commissioner Melton and District Attorney Wilcox, moved in this proceeding for an order dismissing the petition and for judgment declaring that section 510(4-a) of the Vehicle and Traffic Law is constitutional. The Court (Supreme Court, Albany County, WILLIAMS, J.) denied that motion and declared that Vehicle and Traffic Law, §510(4-a), is unconstitutional and that the form used by the respondent Commissioner to implement the statute is also unconstitutional (A-24, A-27). Judgment was entered on August 17, 1978.

On appeal the Appellate Division unanimously reversed the judgment and held that the statute and the form utilized are not unconstitutional nor illegal (A-11-A-15). That Court stated (Herlihy, J.):

> "There is no support for the conclusion of Special Term that section 510 is vague as to a definite date for suspension or as to proper notice. As quoted hereinabove,

section 510 expressly provides that there must be a minimum period of 30 days from the date of the notice of suspension and it is expressly limited to last no longer than the failure of a licensee to appear after such notice is given (see *Kane* v. *City of Brooklyn*, 114 N.Y. 586). Section 510 expressly required notice to the licensee and there is no vagueness in that regard.

"The contention that the form MV-1160 is a rule or somehow unconstitutionally vague is likewise without any support. The statute expressly requires that notice be given to motorists and the form herein is nothing more nor less than the transmittal of notice. There is nothing about the MV-1160 which shows it to be a statement implementing or applying law (Executive Law, §101-a, subd. 1, par. [b]). While it recites the statutory basis for the notice, it does not in any way purport to be anything other than the statutory notice. Accordingly, Special Term erred in construing the MV-1160 as not complying with section 510. The language of MV-1160 quoted hereinabove which indicates that the suspension would become effective 30 days after the date of the notice 'unless * * * your record indicates that other action necessary' is not vague and does not undermine the effectiveness of the notice. It is upon its face a reservation of the right of the Department of Motor Vehicles to take whatever action it might be authorized to take upon a review of his record. This is a power which it had regardless of the particular conduct which prompted the issuance of the MV-1160 because of his failure to appear in court. (A-14)

"Finally, the lack of a pre-suspension hearing is not violative of the petitioner's due process rights. In this case the State's interest is in keeping reckless drivers off the road as was the situation in *Matter of Horodner* v. *Fisher (supra)*. Under such circumstances, the available review pursuant to CPLR article 78 of the order issued is sufficient protection *(Dixon* v. *Love*, 431 U.S. 105; *Matter of Horodner* v. *Fisher, supra)*." (A-15)

An order reversing the Special Term judgment was entered on May 9, 1979 from which the petitioner appealed to the New York

State Court of Appeals (A-8-A-10). A stay of the criminal trials was granted by the Court of Appeals pending the appeal taken by the petitioner.

The Court of Appeals in a unanimous concurrence affirmed the order of the Appellate Division "for the reasons stated in the opinion of Mr. Justice J. Clarence Herlihy at the Appellate Division (67 AD2d 242)" (A-1).

An order and remittitur were entered in the Albany County Clerk's office on February 22, 1980 (A-2) and final judgment was entered on April 9, 1980 (A-6).

The trials in the Justice Courts have not yet been held and are still pending. At no time during the foregoing events while appellant was suspended on the record did appellant ever actually surrender his license.

Applicable Statutory Provisions

Section 510 of the Vehicle and Traffic Law provides in part:

"§510. Suspension, revocation and reissuance of licenses and certificates of registration

* * *

"4-a. Suspension for failure to answer an appearance ticket. Upon receipt of a court notification of the failure of a person to appear within three months of the return date or new subsequent adjourned date, pursuant to an appearance ticket charging said person with a violation of any of the provisions of this chapter (except one for parking, stopping, or standing) or of any lawful ordinance or regulation made by a local or public authority, relating to traffic (except one for parking, stopping, or standing) the commissioner or his agent may suspend the driver's license or privileges of such person pending receipt of notice from the court that such person has appeared in response to such appearance ticket. Such suspension shall take effect no less than thirty days from the day upon

which notice thereof is sent by the commissioner to the person whose driver's license or privileges are to be suspended.

* * *

"§511. Operation while license or privilege is suspended or revoked

"1. Any person operating a motor vehicle upon a public highway while his license or his privilege of operating a motor vehicle in this state or his privilege of obtaining a license issued by the commissioner is suspended or revoked shall be guilty of a misdemeanor, * * *"

ARGUMENT

This appeal does not raise any substantial Federal question and should be dismissed. New York State Vehicle and Traffic Law, §510(4-a) is constitutional and there was no violation here of procedural due process.

Appellant contends that his rights under the due process clause of the Fourteenth Amendment have been offended by the application of the New York State Vehicle and Traffic Law, §510(4-a) whereby his automobile operator's license was suspended without a hearing, as such rights have been defined by this Court in *Bell v. Burson*, 402 US 535 (1971); *Dixon v. Love*, 431 US 105 (1977); *Mackey v. Montrym*, 443 US 1 (1979).*

Appellant loses sight of the fact that the New York State Appellate Division in reversing the lower court unanimously held:

"In this case the State's interest is in keeping reckless drivers off the road" (A-15).

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*Curiously, petitioner's reliance is placed on the *dissenting* opinion in *Mackey v. Montrym*, 443 US at 19. Jurisdictional Statement, pages 7, 8, 9, 10, 11, 13 and 14.

In *Bell v. Burson*, the Court was not concerned with a "reckless" driver but rather with a participant in a motor vehicle accident who had simply failed to post security under a statutory scheme which significantly involved the issue of liability, yet his license was suspended without any opportunity for a hearing to show there was no reasonable possibility of a judgment's being rendered against him. The State has a compelling interest in preserving the safety of the roads* and thus this case is not materially different from *Dixon v. Love, supra*, nor *Mackey v. Montrym, supra*.

In *Dixon v. Love*, this Court held that the Illinois statute authorizing the suspension or revocation of a driver's license without a preliminary hearing upon a showing that the driver has been repeatedly convicted of traffic offenses** "to a degree which indicates lack of ability to exercise ordinary and reasonable care in the safe operation of a motor vehicle or disrespect for the traffic laws and the safety of other persons upon the highway" (*id.* at 109) did not violate procedural due process.

In *Mackey v. Montrym*, this Court upheld the Massachusetts statute which mandated a suspension of a driver's license without a preliminary hearing upon the receipt by the Registrar of Motor Vehicles of the police report indicating his refusal to submit to a breathalyzer test after his arrest for operating a motor vehicle while under the influence of intoxicating liquor.

The three pronged test by which this Court determined there was no due process violation in either of the above cases as formulated in *Mathews v. Eldridge*, 424 US 319 (1976) is easily passed by the New York provision challenged by this litigation.

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*Annexed hereto as R-1 is a printout of Harding's operating Record as contained in the records of the Department of Motor Vehicles.

**Dixon in a period of 5-1/2 years (1) had his license suspended for three convictions within a 12-month period, (2) was convicted for driving while his license was suspended, and (3) was convicted of speeding three times within a period of seven months.

The first step in the balancing process is to identify the nature and weight of the private interest which is affected. Here too the private interest is the license to operate a motor vehicle. As emphasized in *Mackey*, "The duration of any potential wrongful deprivation * * * is an important factor in assessing the impact of official action on the private interest involved" (*id.* at 12). Here the driver simply turns up in court in response to the traffic summons and the suspension automatically lapses. This is dramatically shorter in duration even than the "immediate hearing" available in *Mackey*.

The second test involves consideration of the likelihood of error. This Court said in *Mackey* that it has generally required "no more than that the predeprivation procedures * * * provide a reasonably reliable basis for concluding that the facts [justify] the official action" (*id.* at 13). Here the basis for the suspension is the fact of a notice from the Court that the driver had defaulted in appearance for more than three months. The risk of error is minimal. Moreover, the driver has a timely opportunity to correct any possible errors simply by appearing (*id.* at 15).

Moreover, as in *Mackey v. Montrym*, it is hard to see how reliability would be enhanced by mandating a pre-suspension hearing. It would be "an exercise in futility" (*id.* at 16); the statute, like the Massachusetts statute in *Mackey*, has already made the determination that triggers the suspension. It cannot be said that the determination that after a driver has failed to appear for three months in response to a ticket for a moving violation — in this case, speeding — he should be given notice that in no less than 30 days his license may be suspended for his failure to appear, is not eminently fair.

For the third and final test, the governmental interest served, weighs most strongly in favor of the State. The State plainly has the right to provide a "strong inducement" (*id.* at 18) to bring drivers ticketed for traffic violations "(except one for parking, stopping or standing)" before the Court. The Legislature is presumed to have found that measures such as this were needed

to bring about better compliance with traffic tickets (Vehicle and Traffic Law, §510[4-a]). Limiting the statute to moving violations and thus highlighting the State's concern with safety on the road, as in *Dixon v. Love* and in *Mackey v. Montrym*, is acknowledged to be not only a legitimate, but an urgent state concern. And in exercising its police powers, the State is not required by the due process clause to draw finer distinctions than that. *Mackey, supra*, at 19.

Surely, a driver who has defaulted for more than three months on a ticket for a moving violation cannot stand before this Court and assert that his private right to operate a motor vehicle is greater than the interest of the State in encouraging compliance with the most elementary procedures for enforcement of highway safety, to wit, notice of suspension of his license if he does not appear in court within the next 30 days.

There is no question that a reasonable person subject to this statute is properly informed by the statutory procedure of the nature of the offense prohibited and its consequences (*Colautti v. Franklin*, 439 US 379, 390 [1979]), as well as of what is required of him to relieve him from the suspension, namely, appear in court. The procedure grants a sufficient warning time to permit the offender to correct the prohibited conduct before the suspension will become effective. This surely provides sufficient safeguard to satisfy due process and is constitutional (*Dixon v. Love, supra*, 431 US 105 [1977]; *Mathews v. Eldridge*, 424 US 319, 333 [1976] and *Mackey v. Montrym, supra*, 443 US 1 [1979]).

The notice clearly apprised this recipient of the risk of suspension. He had several options: He could question the notice, appeal therefrom within the stated time before the suspension became effective*, seek judicial review in a civil proceeding

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*Article 3-A of the Vehicle and Traffic Law created an Administrative Appeals Board to review appeals of suspension or revocation orders issued by the Commissioner. Section 261 of that law sets forth the appeals procedure. The appellant never utilized this appeal process.

under Article 78 of the New York Civil Practice Law and Rules, or he could simply appear before the Court. There is ample due process under this procedure (*Matter of Horodner v. Fisher*, 38 NY2d 680, app dsmd 429 US 802 [1976]).

The statute, which provides for the suspension of the license without a hearing until the petitioner submits to the Court to answer the charges against him, is a valid exervise of the State's police power and is not a denial of due process. The "timing of the legal process due the licensee" is appropriate (*Mackey v. Montrym, supra*, 443 US at 11).

This appeal lacks a substantial Federal question and should be dismissed (*Matter of Horodner v. Fisher, supra*).

CONCLUSION

The appeal should be dismissed.

Dated: Albany, New York
May 28, 1980

Respectfully submitted,

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APPENDIX

State of New York DEPARTMENT OF MOTOR VEHICLES,
Empire State Plaza, Albany, New York 12228

ABSTRACT OF OPERATING RECORD

REQUEST CODE
****** ML

In compliance with Section 354 of the Vehicle and Traffic Law, I hereby certify that I have caused a search to be made of the records of the Department of Motor Vehicles, with respect to:

HARDING, RAYMOND, B
3135 JOHNSON AV
RIVERDALE NY 10471

VIS
Date of Birth 1/31/35
Sex MALE
Print Date 7/27/78
Identification No. HO163796878961255-35
Type of License *4*
Date of Issuance 1/31/81
Requested As:

RESTRICTIONS A
INDICATORS 00000000 10001000 01011000

FRMT 00 1811

ABSTRACT OF OPERATING RECORD

R-1

Abstract of Operating Record

Type	Date of Viol. Order or Acc.	Case Number or Conviction Date	Order No. or Location of Accident or Court	Description		Pts.	FINE $	Remarks	Batch Number
HEIGHT 6 2	EYE	COLOR HA		LICENSE BATCH 7022313208					
	X 69110	00000							
	C 00003	89298							
	H 40222	10408							
VOLS	5/19/70			N.J.					
	2/22/74			DRVG LICENSE REINST					
SUSP	11/19/77	0000000	M101977	FLD ANSWER SUMMONS					7101701953
	3/30/78	0000000	M101977	SUMMONS ANSWERED					7101701953
SUSP	12/30/77	0000000	D113077	FLD ANSWER SUMMONS					7112905564
	4/05/78	0000000	D113077	SUMMONS ANSWERED					7112905564
CONV	6/20/77	4/07/78	GREE 53	SPEEDING	73/55	3	50		8042521930
CONV	3/11/78	4/18/78	RENS 62	SPEEDING	75/55	3	CD		8051221430
	5/12/78			WARNING LETTER					
CONV	5/24/77	4/07/78	ULST 64	SPEEDING	75/55	3	50		8051725030
	C RV	0000000							
REV	5/12/78	0816723	A805180	3 SPEED/MISDEM MO		Y		5/12/78	
CONV	4/12/76	4/14/78	ULST 61	SPEEDING	76/55	3	25		8051920130
CONV	5/24/76	4/14/78	ULST 61	SPEEDING	72/55	3	25		8051920130

Type	Date of Viol. Order or Acc.	Case Number or Conviction Date	Order No. or Location of Accident or Court	Description	Pts.	FINE $	Remarks	Batch Number
CONV	9/29/76	4/18/78	ORAN 52	SPEEDING 79/55	3	30		8051921330
	C 00008	16723						
POINT	REDUCTION	COMPLETED	(4/29/78)					
	Q 00000	00039			−3			
RESTRICTED LICENSE ISSUED			(5/26/78)					
	D 80526	70057						

THE ACCIDENT REPORTS LISTED ABOVE OCCURRED ON OR AFTER SEPTEMBER 1, 1965. BECAUSE REPORTS WITH INSUFFICIENT INFORMATION ARE NOT RECORDED, THIS MAY NOT BE A COMPLETE LIST OF THE ACCIDENTS THE PERSON HAS BEEN INVOLVED IN SINCE SEPTEMBER 1, 1965. POINT VALUES OF CERTAIN CIOLATIONS WERE CHANGED AS OF DECEMBER 1, 1966. THIS WILL ACCOUNT FOR DIFFERENCES IN POINT VALUES SHOWN ABOVE.

SS—Suspended Sentence
BF—Bail Forfeiture
P—Police
UD—Unconditional Discharge
CD—Conditional Discharge
3—Not to be considered in Re-examination Program

COMMISSIONER OF MOTOR VEHICLES
Certified by /s/ JAMES A. RUSSETT
Certification Clerk or other Authorized Signature

JUL 27 1978
(SEAL)